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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANGELNETTE T. BUCKNER, Defendant and Appellant.	B241473 (Los Angeles County Super. Ct. No. BA379659)

APPEAL from a judgment of the Superior Court of Los Angeles County. Ronald H. Rose, Judge. Reversed with directions.

Thomas K. Macomber, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Angelnette T. Buckner appeals from the trial court's order denying her motion to suppress marijuana and other items seized during a warrantless search of her apartment. We reverse the court's judgment finding her guilty of possession of marijuana for sale, direct the court to grant her motion to suppress, and remand for further proceedings.

FACTS AND PROCEEDINGS

One evening in January 2011, Los Angeles Police Officer Alfred Gonzales was on patrol with his partner shortly before 6:00 p.m. when a radio call directed them to a second floor apartment of a multi-unit building on South Occidental Street. When they arrived at the location, they took the elevator to the second floor. As they got out of the elevator, Officer Gonzales "noticed a strong smell of marijuana" in the apartment building hallway. They walked approximately 75 feet from the elevator to the apartment. As they approached the apartment, the marijuana smell strengthened, but Officer Gonzales could not tell whether the odor was "fresh" or "burnt" marijuana. When the officers drew close to the apartment, Officer Gonzales saw its door was ajar about six- to eight-inches and an electrical extension cord ran from a hallway outlet into the dark apartment. The officers paused to listen for any sound. About 30 to 45 seconds later, Officer Gonzales heard an unintelligible male voice in the apartment. Without identifying himself as a police officer, Officer Gonzales knocked "fairly hard" on the door. Officer Gonzales then heard "what sounded . . . like some rumbling and shuffling." Believing the occupants might be destroying evidence, the officers pushed the door open and entered the apartment without a warrant. Illuminating the apartment with his flashlight, Officer Gonzales saw appellant, two men, and what appeared to be marijuana on a coffee table. Officer Gonzales testified that he entered the apartment based on the "rumbling and shuffling" and because he "thought that with the smell of the marijuana coming from the room, also based on the comments of the call, I believed this was possibly a narcotics location and that there was potential they could be destroying evidence." The "comments of the call," he testified, were the "strong smell of

marijuana," the door being "slightly ajar" and the electrical cord "coming out of the door."

Officer Gonzales asked appellant and the two men to step out into the hallway. The officers then searched the apartment, recovering cash and marijuana.[1] The People charged appellant with possession of marijuana for sale. Appellant pleaded not guilty and filed a motion to suppress the evidence seized from her apartment. (Pen. Code, § 1538.5.) Appellant's motion acknowledged the smell of marijuana gave the officers probable cause to seek a search warrant, but argued that the circumstances known to the officers when they stood outside her apartment did not create exigent circumstances, such as probable cause to believe the apartment's occupants were destroying evidence, to justify their warrantless entry into her apartment.

The trial court denied appellant's motion to suppress. Finding the officers acted lawfully, the court explained, "Here we have a door that's open, electrical cord that's running out. Presumably they could investigate that. They knock and there's no immediate response. The issue is whether or not that is sufficient for them just to walk in to make contact with the individuals, and the odor of marijuana is overwhelming if they can smell it 75 feet away. [¶] So it isn't a case where somebody walks up and can smell a small quantity. Clearly, there must be a much larger quantity or it was recently smoked if somebody is able to smell it from that distance. [¶] So at this point, I will deny the motion to suppress . . . ." Following the court's ruling, appellant withdrew her not guilty plea and pleaded no contest. The court suspended the proceedings and imposition of

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1 After Officer Gonzales directed appellant and her companions to the hallway, he established that appellant was the apartment's tenant and received her written consent to search the apartment. Apparently, the trial court implicitly found that appellant's consent was not voluntary following her removal from the apartment. As the court explained in denying appellant's motion to suppress, "The issue here *boils down to* whether or not the officers could walk into the apartment because *once they removed* the defendant from the apartment, they get consent to search. So *the issue is the initial entry* into the apartment." (Italics added.) Moreover, the Attorney General does not rely on appellant's after-the-fact written consent as vitiating the People's need to show exigent circumstances for the officers' initial entry into appellant's apartment.

sentence and ordered appellant to serve three years' formal probation and time served. This appeal followed.

DISCUSSION

Appellant argues, and the Attorney General accepts, that a warrantless entry and search of a person's residence, such as appellant's apartment here, is presumptively unreasonable under the United States and California Constitutions. (*People v. Torres* (2012) 205 Cal.App.4th 989, 993 (*Torres*).) The Attorney General acknowledges that the People bear the burden of showing exigent circumstance to rebut the presumption of unreasonableness. (*People v. Rios* (1976) 16 Cal.3d 351, 355-56.) The Attorney General asserts exigent circumstances existed here because Officer Gonzales believed the apartment's occupants were destroying evidence. (*People v. Ramey* (1976) 16 Cal.3d 263, 276 [" 'exigent circumstances' means an emergency situation requiring swift action to prevent imminent danger to life or serious damage to property, or to forestall the imminent escape of a suspect or destruction of evidence"].) Appellant contends the circumstances known to Officer Gonzales did not permit him to conclude appellant and her companions were destroying evidence of a sufficiently serious crime to permit a warrantless entry into her apartment.[2] We agree.

We review the trial court's factual findings for substantial evidence. We independently review the constitutional reasonableness of a warrantless entry and search. (*In re Raymond C.* (2008) 45 Cal.4th 303, 306; *People v. Glaser* (1995) 11 Cal.4th 354, 362; *Torres, supra,* 205 Cal.App.4th at p. 993.) We measure the exigency arising from suspected destruction of evidence by the facts known by the officers at the time of the search. (*People v. Panah* (2005) 35 Cal.4th 395, 465; *People v. Ramey, supra,* 16 Cal.3d at p. 276.) The officer's facts must be "specific and articulable." (*People v. Gentry* (1992) 7 Cal.App.4th 1255, 1262.) An officer must have "probable cause" to believe destruction of evidence is imminent. (*Torres* at p. 994; *People v. Thompson* (2006)

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[2] Appellant concedes the circumstances, on the other hand, gave the officers probable cause to seek a search warrant, but they did not do so here.

38 Cal.4th 811, 817-818.) " 'Fear or apprehension alone that evidence will be destroyed will not justify a warrantless entry of a private home.' " (*Gentry* at p. 1262.) "When establishing exigent circumstances, it is not sufficient to merely state that the evidence is on the premises. [Citation.] There must be some proof that shows the removal or destruction of the evidence is imminent." (*United States v. Driver* (1985) 776 F.2d 807, 811.) Finally, the officers must reasonably believe the evidence about to be destroyed is of a crime for which incarceration is a possible punishment. (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1034 (*Hua*) ["entry into a home to preserve evidence from imminent destruction is limited to evidence of crimes that are not minor"].)

Here, Officer Gonzales "noticed a strong smell of marijuana" when he got out of the elevator 75 feet from appellant's apartment, with the smell intensifying as he approached the apartment. Standing outside the apartment, he saw an electrical cord running from a hallway outlet into the apartment through a slightly open door. But Officer Gonzales did not cite appellant's "stealing" electricity from the hallway outlet as a reason for entering the apartment. And the mere smell of marijuana does not, by itself, justify a warrantless entry into a residence.[3] (*Hua, supra,* 158 Cal.App.4th at pp. 1035-1036.) Possession of less than one ounce of marijuana is an infraction for which the maximum penalty is a fine of no more than $100. (Health & Saf. Code, § 11357, subd. (b).) The nonjailable consequence of simple possession of a small amount of marijuana creates an important demarcation in what police may, and may not do, when they smell marijuana.[4] The demarcation balances the constitutional sanctity of one's home against

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[3] Indeed, simple possession for personal use of marijuana might not even be illegal under state law if the use is medicinal. Although not known to Officer Gonzales when he entered appellant's apartment, appellant apparently had a medical prescription for marijuana which she may continue to use under the terms of her probation.

[4] Because simple possession of less than one ounce of marijuana is no longer a jailable offense, the Attorney General's reliance on cases such as *Guidi v. Superior Court* (1973) 10 Cal.3d 1 and *Vaillancourt v. Superior Court* (1969) 273 Cal.App.2d 791 from decades ago when possession of any amount of marijuana was a jailable offense is misplaced. (*Torres, supra,* 205 Cal.App.4th at p. 997.)

law enforcement's duty to suppress crime. Two decisions illustrate that the balancing here weighs in appellant's favor.

In *Hua, supra,* 158 Cal.App.4th 1027, officers received a report of a "noise disturbance" at an apartment building. (*Id.* at p. 1030.) As they approached the noisy apartment, they noticed the " 'distinct odor' of burnt marijuana" – evidence of a possible crime was thus literally going up in smoke. They knocked on the apartment door and, while waiting for a response, peered through the apartment's open window blinds. The officers saw several people inside, one of whom inhaled from what appeared to be a marijuana cigarette, confirming the officers' suspicion that criminal activity was likely underway. The defendant then opened the door. The officers told the defendant they were concerned about the destruction of evidence "because of the amount of smoke evident inside the apartment" and asked for the defendant's consent to enter his apartment. He refused, but the officers went inside anyway. (*Id.* at p. 1031.)

On review, the *Hua* court found no exigent circumstance arose from the officers' seeing someone smoke marijuana even though the act of smoking was destroying evidence. The *Hua* court stated, "a finding of exigent circumstances is *categorically precluded* when the only crime the police are aware of when they enter a residence to arrest the occupant and/or seize contraband is possession of no more than 28.5 grams of marijuana." (Italics added.) (*Hua, supra,* 158 Cal.App.4th at p. 1030.) The Attorney General argued the officers had reason to believe the defendant possessed more than one ounce of marijuana, which is a jailable offense that would permit a warrantless entry to preserve evidence from imminent destruction. But the *Hua* court rejected the People's argument as conjecture. The court stated, "While we accept the reasonable possibility that there was more marijuana in the apartment than the two blunts observed by the officers, it is mere conjecture to conclude that there was enough to constitute a jailable offense." (*Id.* at p. 1036.) The *Hua* court explained that society's interest in suppressing minor marijuana offenses does not overcome society's greater interest in the privacy of homes. The court explained: "California has chosen to treat the offense of possession of less than 28.5 grams of marijuana as a minor offense that is nonjailable even for repeat

offenders. . . . [O]ne consequence of that decision is to preclude officers who see this offense being committed from entering a home without a warrant or consent to seize the offender or the contraband, in order to prevent the imminent destruction of evidence of the offense." (*Id.* at p. 1037.)

Our decision in *Torres, supra,* 205 Cal.App.4th 989 embraced *Hua.* In *Torres,* officers noticed a "strong smell" of marijuana two or three feet from a hotel room door. (*Torres* at p. 992.) Although the marijuana odor was the only indication that the room's occupants were smoking marijuana, the officers entered the room without a warrant. The trial court denied the defendant's motion to suppress the marijuana, finding "police officers could lawfully enter the hotel room to prevent marijuana from being destroyed or from 'going up in smoke.' " (*Id.* at p. 993) We reversed the trial court because the officers had no specific and articulable facts supporting probable cause to believe destruction of evidence of a jailable offense was imminent. We explained, "police only smelled the odor of burning marijuana. They had no other information about marijuana possession or any other marijuana-related crime occurring in the hotel room. No evidence indicated the officers had reason to fear the imminent destruction of evidence of a jailable offense. . . . [A] belief that evidence of a nonjailable offense will be imminently destroyed is not sufficient to justify a warrantless entry based on exigent circumstances." (*Id.* at p. 995.)

The Attorney General distinguishes *Hua* and *Torres* from appellant's circumstances, but the distinctions are unavailing. The Attorney General notes, for example, that *Hua* and *Torres* did not involve marijuana smelled 75 feet away. According to the Attorney General, an odor wafting such a distance suggests a large amount of marijuana. Moreover, according to the Attorney General, the electrical extension cord suggested appellant might have been drawing extra electricity for grow-lights to cultivate marijuana inside the apartment, again suggesting a large amount of marijuana. And finally, Officer Gonzales heard "some rumbling and shuffling" after knocking "fairly hard" on the door to appellant's apartment.

We are unpersuaded because Officer Gonzales' speculation about a large amount of marijuana inside the apartment was just that. He conceded he could not tell whether the marijuana smell was "burnt" or "fresh," breaking any link between the odor's pungency and the amount of marijuana. Also, Officer Gonzales and his partner did not identify themselves as police when they knocked on appellant's door. Thus, the officers' conclusion that "rumbling and shuffling" inside the apartment meant the occupants were trying to keep evidence from the police by destroying it was speculation because the occupants did not know it was police who had knocked. (*People v. Gentry*, *supra*, 7 Cal.App.4th at p. 1264 [officers "must have an objectively reasonable basis for believing there is someone inside the residence who has reason to destroy evidence"]; contrast *People v. Ortiz* (1995) 32 Cal.App.4th 286, 290, 293 [officers in line of sight of defendant inside hotel room, thus reasonable for officers to believe defendant might try to destroy evidence before officers could seize it].) As for the extension cord, Officer Gonzales did not testify he thought appellant was stealing electricity as his reason for entering the apartment without a warrant. And the Attorney General's assertion offered on appeal (but not urged by the People in the trial court) that an extension cord running into a dark apartment suggested marijuana cultivation, instead of, say, electrical problems inside the apartment, finds no support in the record.

The Attorney General asserts appellant failed to preserve her argument that Officer Gonzales and his partner had no grounds to believe appellant possessed more than one ounce of marijuana. Thus, according to the Attorney General, appellant has forfeited the point. The Attorney General's assertion is tantamount to claiming appellant had the burden of producing evidence that the amount of marijuana was less than one ounce. The assertion is mistaken. Appellant's motion to suppress argued the smell of marijuana did not give Officer Gonzales and his partner enough facts to justify a warrantless entry into appellant's apartment. In response to appellant's motion, the People bore the burden of showing the officers had probable cause to believe an exigent circumstance existed, such as the destruction of more than one ounce of marijuana. (*People v. Rios* (1976) 16 Cal.3d 351, 355-56.) Appellant's motion to suppress did not

need to create a road map of each element the prosecution must prove for the trial court to find an exigency. "[D]efendants must specify the precise grounds for suppression of the evidence in question, and, where a warrantless search or seizure is the basis for the motion, this burden includes specifying the inadequacy of any justifications for the search or seizure. In the interest of efficiency, however, defendants need not guess what justifications the prosecution will argue. Instead, they can wait for the prosecution to present a justification. Moreover, in specifying the inadequacy of the prosecution's justifications, defendants do not have to help the prosecution step-by-step to make its case. The degree of specificity that is appropriate will depend on the legal issue the defendant is raising and the surrounding circumstances. Defendants need only be specific enough to give the prosecution and the court reasonable notice. Defendants cannot, however, lay a trap for the prosecution by remaining completely silent until the appeal about issues the prosecution may have overlooked." (*People v. Williams* (1999) 20 Cal.4th 119, 127, 130-131 [motion to suppress that focused on lack of probable cause to stop vehicle, but which also cited case law governing inventory search of vehicle's contents, preserved appellate challenge to inventory search].)

In *Torres*, we rejected as "not a meaningful distinction" the Attorney General's attempted distinction between *Hua* and *Torres* which turned on a defendant's implied duty to prove the defendant possessed less than one ounce of marijuana. In *Hua*, the officers saw through open window blinds only one person smoking marijuana, which tended to suggest the defendant possessed a small amount of marijuana. But in *Torres*, the officers did not make any observation through a closed hotel door that might have suggested only a small amount of marijuana was inside the hotel room. We said in *Torres*, "This is not a meaningful distinction. In both cases, police officers smelled marijuana burning from outside the residence. In this case, the smell was the *only* indication police had that marijuana was being consumed. In both cases, police officers had no basis other than speculation to believe that more than 28.5 grams of marijuana was being possessed in the residence. As explained in *Welsh,* 'the police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless

searches or arrests.' [Citation.] Speculation that someone inside a residence could be possessing more than 28.5 grams of marijuana based on nothing more than the smell of burning marijuana emanating from the residence, with no other details, does not meet that heavy burden." (Italics original.) (*Torres, supra,* 205 Cal.App.4th at p. 996.) Likewise here. Officer Gonzales smelled marijuana, but he could not tell whether it was burnt or fresh. Thus, the amount of marijuana inside the apartment was conjecture. Speculation that the amount may have been more than one ounce did not support the warrantless entry. (*Ibid.*)

The Attorney General asserts *Hua* and *Torres* were wrongly decided. The Attorney General acknowledges advancing the assertion in order to preserve the Attorney General's argument for further appeal (presumably to our Supreme Court.) We note the Attorney General's assertion, but stand by our decision in *Torres*, and its reliance on *Hua*, as correctly decided.

DISPOSITION

The judgment is reversed, and the trial court is directed to grant appellant's motion to suppress evidence seized from her apartment. The matter is remanded for further proceedings.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.